

# The Justification of Basic Rights

## A Response to Forst\*

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### 1 Introduction

Rainer Forst's paper displays all the characteristic intellectual tenacity and philosophical imagination of its author. It offers a significant restatement of the Kantian orthodoxy in modern-day analytical practical philosophy. These remarks cannot hope to do justice to the richness and complexity of Forst's theory. I focus on a few areas of concern raised by his account of basic rights. In sum, my concerns are threefold. First, it is not clear what the theory says. I try to explicate it first. Second, the theory, if I have understood it correctly, seems to be wrong. Third, in dealing with problem cases, it risks circularity.

### 2 What is the theory?

The main challenge in understanding Forst's argument is not that it says too little, but that it says too much. Forst gives a number of distinct statements of the basic rights, the right to justification and the latter's own grounding in the first half of the paper and it is hard to know which is meant to be canonical. For instance:

- a 'basic rights are rights that equal justificatory authorities can always claim to possess and can never deny each other (...) Their moral ground is the basic right to justification';<sup>1</sup>
- b '[the basic moral right to justification is the] basic right to be an equal co-author of the norms to which one is subject and which define one's basic standing in society';<sup>2</sup>
- c 'these rights (...) have a "ground" that is both moral and, if you will, transcendental: the autonomy of persons with a right to justification as a normative authority equal to all others';<sup>3</sup>
- d 'their [the rights'] ground is the respect for each other as moral equals (...) the "ultimate" justification of these rights is the principle of justification itself';<sup>4</sup>

\* I take this opportunity to thank the organizers of the enjoyable one-day conference on Forst's paper staged by Tilburg University on 10 June 2016, notably Elaine Mak. I would also like to thank the other participants, most especially Rainer Forst himself.

1 Rainer Forst, 'The Justification of Basic Rights. A discourse-theoretical approach', *Netherlands Journal of Legal Philosophy* 45(3), 10.

2 Forst, 'The Justification of Basic Rights', 9.

3 Forst, 'The Justification of Basic Rights', 10.

4 Forst, 'The Justification of Basic Rights', 10-11.

- e 'Kant's notion of the *dignity* of autonomous persons (...) ground[s] basic rights',<sup>5</sup>
- f 'the theory I propose uses the principle of justification itself as the justifying ground for a theory of human rights, which is why I call it a reflexive and autonomous theory: it appeals to no other ground than the normative principle of justificatory reason.'<sup>6</sup>

These formulations speak successively of the ground for basic rights as lying in the right to justification, co-authorship, autonomy, respect, dignity and the principle of justification itself. It is hard to say which formulation is meant to be canonical, unless (improbably) they are meant to be equivalent. These formulations neither coincide nor concur. Forst's account makes clear that the basic rights (plural) derive from a fundamental basic right. What is the content of the latter? According to extract (c) this is 'a right to justification as a normative authority equal to all others'. That right could be questioned. If, as I assume, it is the normative authority, rather than the right to justification, that is held to be equal to all others, one can ask whether that in turn needs grounding, or is invoked as a self-evident norm.

In certain key respects it remains unclear to me how the basic right to justification is intended to work. Much of what follows is devoted to trying to clarify this.

### 3 Analysis

As we have seen, Forst's discursive account of the justification of the basic rights<sup>7</sup> themselves is formulated in a variety of ways. *Grosso modo* the idea seems to be that the very circumstances in which it is imagined that claims about rights are exchanged are such as to justify (certain kinds of) claims about them, like their justification and scope. Forst summarizes this by way of his avowedly Kantian notion of a 'basic right to justification'. This holds that persons as such are owed reasons that are reciprocally and generally acceptable for their treatment by others – and thus acceptable, in particular, to those so treated. Questions already arise at this level of specification, but Forst's formulation of the justificatory account also raises some puzzles, which cast doubt on his project's viability.

On the face of it, Forst's justificatory project proposes a fundamental right, and seeks to derive other, 'basic' rights from this fundamental right. While the anticipated content of the basic rights presumably coincides fairly closely with that of the rights countenanced by legal instruments such as the UN Declaration, Forst stresses that they are in no way dependent on values or interests.<sup>8</sup> One immedi-

5 Forst, 'The Justification of Basic Rights', 11.

6 Forst, 'The Justification of Basic Rights', 13.

7 I assume that these rights are understood as Hohfeldian claim-rights, i.e., rights that entail the existence of countervailing obligations, so that if A has a right that p, this holds only if there is someone who is obligated to see to it that p.

8 See e.g. Forst, 'The Justification of Basic Rights', 9.

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ate question is whether the premise itself is meant to be justified by anything that Forst says. But if its premise is the fundamental right to justification, an argument schema (S) might be set out thus:

- 1 For all persons P, P has a fundamental right to justification.
- 2 The right to justification demands that any specific treatment of some individual person  $P_i$  be reciprocally and generally acceptable, notably to (or in respect of)  $P_i$ .
- 3 Any proposed treatment of  $P_i$  will have to meet the demand in 2.
- 4 Any treatment that meets the demand in 2 must recognize certain basic prescriptions or proscriptions regarding treatment.
- 5 The prescriptions and proscriptions mentioned in 4 can be framed in terms of obligations.
- 6 The obligations mentioned in 5 are similar to those entailed by basic rights claims.

As so framed, the basic rights emerge as part of a constructive discursive exercise. But it is hard to believe that S captures what Forst wants. The most obvious problem is that S seems to embody a formal fallacy, that of affirming the consequent. To say, first, that the basic rights are claim-rights, i.e., such that having a right that p entails that others are obligated to see to it that p, and second, that these obligations, similar to those entailed by the basic rights, are generated by S; this does not suffice to establish the existence of the basic rights. This is no more persuasive as reasoning than, say, noting that water-solubility is a property of salt, and then to infer that because a presented substance is water-soluble, it must be salt.

The following analytical remarks attend first to the inference of the basic rights from the right to justification; to certain normative features of rights as contrasted with obligations; to the right to justification itself; and a problem with the scope of the right.

(a) *Inference to the basic rights*

I first consider the inference from the right to justification to the basic rights. The justification of the basic rights lies in 'the principle of justification itself'.<sup>9</sup> In the light of the various formulations cited above, I am not sure what Forst takes this principle to be. It seems to demand that all transactional behaviour – person-affecting action – have sufficient warrant. That framing of the principle, of course, would already have left behind those sceptical of the universal claim. It is far from clear that a sizeable proportion, let alone all, of the myriad ways in which persons may affect one another are candidates for justification. At the very least, a triviality threshold seems to be required: someone who affects me by humming as I pass him in the street is not a plausible candidate for the justificatory demand. I am not certain what Forst wants to say even about mundane cases like this. I fear that he wishes to take the heroic position of saying that even such

9 Forst, 'The Justification of Basic Rights', 11.

cases (or yet more tenuous ones, such as when a third party demands justification from the hummer) are still eligible in principle for the demand, even if the sane discharge of everyday social life often militates against it.

If he does not wish to press the heroic position, and the 'in principle' in the last sentence is not simply there to rescue the position from seeming risibly over-demanding, then it becomes unclear how far it really imposes a separate demand, distinct from those that moralists impose on conduct in general. For instance, suppose someone engages in some form of deceptive talk. Of course it makes sense to ask whether or how far such talk is morally acceptable or justifiable, and the discussion will then typically address the reasons that might make it so, or (differently) on whether it might be defended on grounds other than its moral acceptability, such as ones that appeal to practical necessity. What does the postulating of a general 'right to justification' add to such situations? It certainly raises supplementary issues, such as who owes the correlative duty who can invoke the right, on whose behalf, and so on. These are, or quickly become, political questions.

Forst seems remarkably sanguine about the answerability of such questions, and that they can be dealt with by the pan-justificationist apparatus. It is far less obvious to me that they can, even in the specific case where only moral justification is in question, rather than the place of morality within a wider scheme of (say) public justification. One contour flattened by the apparatus lies in the fact that persons will be differentially affected by practices such as deception and that justificatory schemata may have to adapt to take this into account.

*(b) Rights versus obligations*

The consequent-affirming fallacy referred to earlier is sufficiently patent that Forst must have something else in mind. I conjecture that he *identifies* the basic rights with the set of obligations that are generated directly or vicariously by the right to justification. Hence the rights obtain if and only if the countervailing obligations do. Thus (6) might be rewritten as follows:

6\* The obligations mentioned in 5 include those constitutive of basic rights claims.

On this view, rights coincide with a lattice of obligations. It then can be asked whether the discretionary character of rights can be fully captured by obligations, which (as Hobbes noted) 'in one and the same matter are inconsistent'.<sup>10</sup> If others are under an obligation to see to it that p, where 'p' names some situation in which you have a right respected, then you do not, at least, have discretion as regards whether or not p. An obvious move at this point is to distinguish the *grounds* on which the right holds from its *content*. It may be said that while the holding of the right's grounds is not discretionary, the content of the right may grant the right-holder discretion in some area. Suppose some notion of autonomy

10 Thomas Hobbes, *Leviathan*, ed. Noel Malcolm (Oxford: Clarendon Press, 2012), vol. II, 198.

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is the ground for people's being obligated to see to it that you have freedom of movement; you do not have discretion about that ground, even though the right itself accords you discretion over your movement. This fits with what I take to be Forst's view that the basic rights cannot be waived.

However, the distinction between rights' grounds and content does not seem to work for every kind of right, including some that any plausible account would see as basic. The proscription on being tortured, for instance, is not usually taken to include a discretionary element, unlike say a right to freedom of movement. If rights necessarily include such discretion, the proscription on torture cannot be expressed as a right. It follows that an understanding of rights as exhaustively specified by obligations on others (than the right-holder) cannot distinguish this category of proscription from those that entail the discretion needed, on the Hobbesian view, for a normative claim to have the force of a right.

There is, further, the possibility that a right may be limited by some factor external to the apparatus that generates the basic rights. The most obvious example is contracting rights out: for instance, people often have to waive certain free speech rights when they sign a contract of employment. In this case, the bi-conditional relation between propositions about rights and about obligations cannot work in unrevised form. Given the distinction just drawn between discretionary content and non-discretionary grounds, it is not clear that the apparatus can even allow for this possibility, though limited contracting out is a well-established feature of systems of rights. It is necessary either to preclude this – a very strong position, which would need correspondingly strong grounds – or to explain how contracting out remains possible from within the construction. In general it might look as though the discursive apparatus is well adapted to this purpose. But the Kantian framework risks making this kind of waiver impossible, on the grounds that it comprises the contractor's dignity – something that no self-legislating member of the Kingdom of Ends can waive. It underlies, for example, Kant's view that self-enslavement contracts are impossible.<sup>11</sup>

I conclude that the conflation represented in S by (5) lacks warrant.

### (c) *The right to justification*

S deploys the right to justification simply as a premise, i.e., a proposition taken as true in order to ground an argument. However, it seems unlikely that Forst sees it this way; for one thing, that would beg the question against sceptics who denied there were any rights to start with. This impression gains colour from Forst's remarks in extracts (c) and (d), which locates the 'ultimate' and 'transcendental' ground for the basic rights in 'the principle of justification itself'. From this I infer

11 See, e.g., Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2010), 135-36. Ripstein interprets Kant's reading of the problem, as lying in a contradiction about legal personality – that the would-be slave both has it and will lack it. The contradiction could also be seen as lying within *moral* personality – that the person both invokes and repudiates her status as a source of valid moral claims.

that the argument aims to convince not sceptics about justification itself, but those who think that one can work with the notion of justification while not committing to basic rights. If Forst succeeds here, he will have shown that dealing in justification must lead to an acceptance of the fundamental right to it, and thence, via *S*, to accepting the basic rights that flow from it.

Suppose you and I engage in some form of justificatory discourse. This might be demonstrating a proof, or giving reasons for some public action, such as lowering central bank lending rates, as well as the various situations where one person offers a moral justification to another. Forst's contention seems to be that if I offer a justification to you, I must thereby commit myself, as a condition of doing so, to acknowledging your right to justification. It is not immediately clear why this should be so. After all, if one person unilaterally engages with another in some matter, it does not follow that the first is acknowledging the second's right so to engage; to suppose otherwise leads, again, to a predictable over-moralisation of everyday life. A footballer who passes to a teammate is not recognizing the latter's moral right to be so treated; indeed she may think that the person ought not to be in the team. It is presumably something about justification as a specific practice that is held to license the transcendental argument. But it is not so clear what this might be.

Certainly someone who undertakes an exercise in justification is accepting a burden with normative content. Their success or failure will depend on how well they discharge this justificatory burden. But doing so need not involve respecting a right. Someone who demonstrates Pythagoras's theorem, say, does not do so only if they satisfy a 'right to justification'; more generally, it is not a condition of justifying something that those to whom justification is made have a right to it. Forst's view, however, seems to be that when one person treats another in a certain way, this of itself creates a right on the part of the second to justification (of the treatment). Evidently, what counts for these purposes as *treatment* needs clarification; Forst appears to take it in a broad sense and, as noted earlier, to believe that more or less any behaviour is such that others may in principle invoke their right to justification in respect of it.

That pan-justificationist view seems implausible, not least because views on which people have basic rights, including Kantian ones such as Rawls's, often include rights to privacy that block intrusive questioning. Invoking a right to privacy against one to justification seeks to trump, rather than accede to, the associated demand. There is the further point, sometimes neglected by advocates of discursive justification, that justificatory prowess is strongly associated with unequally, and perhaps unjustly, distributed goods such as educational level, magniloquence, and so on.<sup>12</sup> More defensibly, it may be said that a person has a right to justification when someone's action affects their legitimate interests. That requires, to be sure, an account of legitimate interests, but that could, for exam-

12 Not coincidentally, such qualities are often displayed in forensic proceedings and judicial decisions.

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ple, be furnished by seeing the political process as one within which interest-claims can be decided. I doubt, however, that Forst would welcome such a move, as being at odds with the Kantian spirit of his project. As soon as the claims are submitted to political decision, their outcome is unpredictable and potentially depends on luck. Further, as Forst's explicit distancing of the project from an interest-based view of rights indicates, it might be thought that the very idea of an interest puts the associated right on an impermissibly contingent footing: that interests are, or include things that are, heteronomous. Pan-justificationism may then look like the only way of avoiding that contingency.

If that is the explanation, however, it under-determines Forst's response. Someone might think that the only real interest people have is that of maintaining self-respect, and also believe that this has a non-contingent basis, since it depends only on one's standing as a self-legislating member of the Kingdom of Ends. Whether or not that is right, it would hardly license pan-justificationism. Much human action does not bear upon respect for others at all. Sometimes the extent to which it does remains unclear, as does the standing of a demand for justification. Forst says that under the requirement of reciprocity as a condition on justification, 'no one may impose his or her non-generalizable views, interests or values on others'<sup>13</sup>; yet the standing of this ambiguously-stated condition in a world where not everyone is a Kantian is unclear. It leaves room for imposition precisely where a view is not non-generalizable, and of course its generalizability is one of the prime features that attract Kantians to their doctrine. But, first, generalizability is not unique to Kantianism, and second, even if it were, some reason would have to be given to particularists as to why Kantianism qualifies for special treatment on these grounds.

Forst pays particular attention to non-domination as an ideal which applies as much to politics as the private sphere. He understands rights as brakes on domination. How far can any political institutions, including democratic ones, avoid imposing non-generalizable views on others? Presumably the answer will be that the basic rights set out what can(not) be done, given the constraint of reciprocity. But it is far from obvious how the acceptable partiality of political decision-making gets distinguished from its unacceptable counterpart, which will be excluded for breaching a basic right. Either the form of justification of the basic rights determines their content, and the discursive element seems redundant; or it does real work, and the content of the basic rights remains more or less indeterminate. Beyond that, there remains the question whether non-dominance operates as a moral side-constraint on political outcomes, or vice versa. It is usually assumed that moral requirements, here in the form of basic rights, determine the shape of

13 Forst, 'The Justification of Basic Rights', 14.

permissible political outcomes rather than the converse. But that needs arguing for, as more generally does the trumping of political by moral reasons.<sup>14</sup>

If S is to work, the notion of a right must be implicit in that of justification itself. But is that correct? It is not obvious that justification, qua the assembling of reasons to support a proposition, itself carries any such implication. There is also a problem of self-subsumption: it seems odd to say that the notion of justification implies a right to *itself*. Someone could say that engaging in the activity of justifying something creates a right – roughly, that the audience is given reasons that, at least in the justifier's view, support whatever it purportedly justifies. But this can hardly be what Forst wants, since it is easy to dodge that by simply not engaging in the business of justification to start with. The construction has to start a step further back, with the idea that some things that people do stand in need of justification – a normative need, encapsulated in the right to justification itself.

Which things? In principle, as we have seen, they could extend to anything that somebody might do or omit to do. It could be said that it always at least makes sense to ask what justifies a given act or omission, but it hardly follows that there is a right to ask the question that includes the legitimate expectation of an answer to it. The point where possibility turns into right is, broadly speaking, where asking the question is appropriate, something that varies contextually. Often 'Mind your own business' is a justifiable riposte to the query,<sup>15</sup> I am not sure when, if ever, Forst considers this an acceptable response. Still, it can be said that there are indeed circumstances where the question is asked appropriately. The second formulation of the categorical imperative might furnish one basis for picking these out: a right to justification is created when (and only when?) one person acts so as to treat another<sup>16</sup> not as an end in themselves, but as a mere means. Putting things this way would have the curious consequence of making the right to justification something that could be invoked only where unjustifiable action had occurred.

That could be sorted out by saying that the right can be invoked in cases of *prima facie* breach – in cases where a person's agency, or capacities needed for it, are instrumentalized by another. But it seems to invert the explanatory order to say that a certain act instrumentalizes someone, and that this is wrong because it violates the right to justification. A more compelling way of putting it is to say that

- 14 For instance, even if a right to justification has primordial status, it remains to be shown that this status depends on its being owed to *persons*, rather than to other agents or agencies. The latter may be able to mount claims alien to individual morality, such as *raison d'état*. Probably Forst would not want to represent such claims as moral ones. But if not, some account needs to be given of why they have no practical force.
- 15 In fact, the point cuts deeper than this, since the question can only be posed when the questioner already knows what the other person is doing. As I remark elsewhere, privacy imposes limits on what the questioner is entitled to know in the first place.
- 16 Kant, of course, explicitly says that this applies also to oneself. Presumably he would have thought that insofar as rights to justification are in play at all, they can be invoked against oneself as against others. I am not sure whether Forst would be happy to make this move.

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the act is wrong, and that shows up, *inter alia*, in the fact that it cannot be justified, for instance to the person who is on the receiving end of it. One way this explanatory priority could be explained is if, because the basis for its wrongness fails to apply, the right to justification lapses. So, for instance, it might be said that sometimes the general proscription on lying or deception may be suspended by consent:<sup>17</sup> in such cases, the parties still respect each other's agency, as persons who have willed this agreement. The right to justification imposes a side-constraint only when the ground of the right applies.

(d) *The problem of scope*

Schema S faces significant questions regarding scope. Forst notes that it extends to possible future or past persons such as neonates and the demented. No doubt *compos mentis* adult humans are our paradigm of persons. But 'human being' and 'person' are not synonymous – for instance, the former but not the latter is a natural kind. Since the right to justification extends beyond sane adults, the question arises how its extension is determined; call the problematic group the *non-person right-holders*. The obvious move is to stipulate that the latter are, at any rate, potential persons; there is some possible world, perhaps, where they are persons.

A possible fork looms here: either right-holders are assigned the basic right because they instantiate some naturalistic property or properties, or else there is some non-naturalistic property, or none, to ground the assignment of the basic right. If there is none, the justification relies on a primitive notion of a person which begs the main question – *To whom or what are duties associated with the basic right owed?* – when it is differentially assigned. To refer to the relevant property as the (presumably non-natural) one of being a *noumenon* leaves the question: in respect of *what* does something have this property? It is not clear to me how an answer to this question will avoid recourse to dogmatic metaphysics.

This can be seen from other angles. Corporate persons have legal personality. Are they owed a right to justification? Why (not)? The answer cannot be that persons are a natural kind. Nor can it be based for Forst on will-formation or having interests. It may be said that corporations have the right because they are composed of (individual) persons who have it. There is the question: is justification transitive or intransitive, and in particular, if the former, are the associated duties owed to the right-holder? Since it is common ground that the right-holder may not be in a position to lay claim to them *in propria persona*, it can again be asked what the relation is between their being owed and the ground on which rests the right that supports them.

Only those discursively enabled will be participants in the exchange of justifications that Forst envisages as specifying the rights that lie downstream from the fundamental right to justification. This can be taken to be equivalent to the set of competent human adults. While Forst thinks that this set does not coincide with – in fact will be a proper subset of – the set of rights-bearers, it is far from clear

17 For example, as part of certain games, such as poker.

who or what comprises the complementary subset. Candidates for membership include human infants and other human beings of unsound mind, as well as non-human animals. The point is not just that sharply differing views will surface about, say, which of the latter are eligible to bear rights, and how extensive the rights are. It is that it is unclear how the fundamental mechanism will work in such cases.

Are babies, the demented, or creatures such as bonobos, owed a justification of their treatment as a matter of right, and how is this exercised? This opens up a wider doubt about how the right to justification works. On the one hand, the idea of justifying a proposed treatment directly *to* individuals from the categories mentioned seems merely silly. On the other hand, if there is some more oblique way of doing so – say by justifying the treatment *in respect of* them – then that might equally apply to others. Again, the point is not merely that the boundaries of the moral community are not well-defined. It is that deciding that question involves a familiar but knotty problem about process: on what basis is it decided on what basis not only moral status, but full citizenship in the moral community, is decided? And, whatever the answer to that question, there remains the non-trivial matter of what justification *to* someone involves.<sup>18</sup>

Similar remarks seem to apply to autonomy and dignity as foundational notions. Indeed, dignity may still support moral claims when someone has lost, never had, or has even renounced autonomy. The point is not merely that the bounds demarcating persons from non-persons is unclear. It is that the unclarity about this raises a question about the justification of the basic rights. If, for instance, it is ‘the principle of justification itself’ (d), the principle needs spelling out in normative form – e.g., ‘For all conclusions C, C is justified only if C validly follows by accredited rules of inference from the given premises.’ This is weaker than the biconditional. But either way, nothing is said in this formulation to show that justification is intrinsically interpersonal, let alone that it is transacted between equal authorities. On the face of it, justification need not be transacted interpersonally at all. Insofar as it is, what can justifiably be said may depend strongly on contextual factors.

It may be that Forst does not intend to produce an analytical argument at all, but to provide an account of what is immanent in justificatory practices.<sup>19</sup> I doubt this, as much of what he says operates at a considerable distance from such practices; he argues, for instance, that justification is owed to individuals even when the person concerned has no capacity for rationality,<sup>20</sup> and is therefore in no state to engage with it dialogically. But if this is indeed what Forst is trying to do, the following difficulty arises: either the practices, taken on their face, bear little

18 One issue that illustrates the complexity here is whether the norms that determine success in justifying an action *to* a person affected by it coincide with those that decide its success with a third party.

19 Here I respond to a suggestion by an anonymous referee.

20 Forst, ‘The Justification of Basic Rights’, 16-17.

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resemblance to any Kantian view of justification, or they have to be interpreted in such a tendentious way that their resemblance to the interpretation becomes remote, and indeed not what is normatively significant about them. This is unsurprising, inasmuch as Kantians will presumably see any real-world correlate of categorical norms as incidental to their justification. The most that one might say is that insofar as the real-world practices of justification shadow these norms, they simply heed, however imperfectly, their practical force. This, I assume, is the thought behind other Kantian exercises in ‘construction’, of which Rawls’s is the best known.<sup>21</sup> The problem here, again, is that given the very high premium Kant put on purity, the construction materials are liable to contamination from what he must see as the merely contingent. To this extent, our status as historical products makes us heteronomous, and Hegel correctly saw that the only remedy for this, short of dropping the demand for emancipation from contingency, was to make history itself an (ultimately) autonomous agent.

#### 4 Containing others’ ends and the circularity problem

I conclude with a remark about the notion of containing others’ ends. Kantians have often upheld as a source for moral normativity the idea that could be expressed by saying that such and such an action is one that rational agents must or cannot do. Forst says that

“To be respected as an end in itself means not to be subjected to actions or norms that cannot be justified to each person as an equal. As Kant explains in the *Groundwork*, treating another as a means (for example, by making a false promise) means that the other “cannot possibly agree to my way of behaving toward him, and so himself contain the end of this action.”<sup>22</sup>

One problem with this Kantian account is how it generalizes to other actions that breach common-sense morality. A bizarre case in Germany a few years ago involved a man who agreed to be killed and eaten by another. Is this a case in which the man contained the end of the other’s action? On false promises – an argument also made by Korsgaard in *Creating the Kingdom of Ends*<sup>23</sup> – there is clearly a sense in which the dupe cannot, qua dupe, agree to the false promisor’s ends at the time. But it hardly follows the dupe cannot agree at all. This is as intelligible as agreeing to be subjected to coercion under specified conditions at some later time. If anything, indeed, it is more intelligible, in that some accounts classify such possibilities as not, just because it has been agreed to, involving coercion, whereas previously willed deception is certainly still deception.

21 John Rawls, ‘Kantian Constructivism in Moral Theory,’ *Journal of Philosophy* 77, no. 9 (1980) 515-72.

22 Forst, ‘The Justification of Basic Rights’, 11.

23 Christine M. Korsgaard, *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press, 1996), ch. 12.

These examples seem to me to show that there is much more room for one agent to ‘contain’ another’s ends than Kant’s account seems to allow. At this point a Kantian is likely to say that cases like those just given pose no counter-example to the theory, because the dupe or putative victim of the cannibalism contract cannot really have contained (via consent to) the other’s project. But that needs to be shown. It would clearly be viciously circular, *vis-à-vis* the grounding project, to object that people at least ought not to agree to such things. If, therefore, the project is to derive the normativity of practical reason from the notion of practical impossibility, it seems to me to fail.